THE TOO FRIENDLY JUDGE? SOCIAL NETWORKS AND THE BENCH

BY CYNTHIA GRAY

Judicial ethics advisory opinions seldom "go viral," but a November 9, 2009 opinion about judges and social networking by the Florida Judicial Ethics Advisory Committee became the subject of numerous newspaper stories worldwide. The opinion advised judges not to add lawyers who may appear before them as "friends" or permit those lawyers to add them as their "friends," although it did not prohibit judges from being on social networks altogether or from "friending" lawyers and others who did not appear before them.[1]

> Although the extent to which judges may participate in social networking is not yet clear, what is clear is the need for caution.

The Florida Committee noted its concern that "listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."

> This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge.

The Committee concluded that the identification in a public forum of a lawyer who may appear before the judge does convey the impression of influence and therefore is not permitted.

The opinion apparently got some push-back from dismayed Florida judges, several of whom proposed ways to get around the problems perceived by the Committee. (According to the *Orlando Sentinel*, many judges defriended lawyers, and a few stopped using Facebook and similar sites altogether after the opinion was issued.) One judge suggested to the committee that the appearance problem could be solved if she placed a prominent disclaimer on her profile page stating the term "friend" should be interpreted to mean that the person is only an acquaintance of the judge, not a "friend" in the traditional sense. A second judge proposed adopting a policy of accepting all lawyers who request as "friends" and communicating that "the term 'friend' is, in the judge's opinion, a misnomer."

Although it "thoroughly and thoughtfully reconsidered" the issue, the Florida Committee rejected those suggestions and reaffirmed the original opinion.[2] All Committee members agreed that "placing a disclaimer on the judge's social networking site uniquely defining the term 'friend'" for the judge's pages would not effectively dispel any otherwise impermissible message. The Committee also rejected the concept that "a judge can engage in unethical conduct so long as the judge announces at the time that the judge perceives the conduct to be ethical." The Committee did state that a judge who is a member of a voluntary bar association is not required to "de-friend" lawyers who are also members on that organization's Facebook page and who use Facebook to communicate about the organization and other non-legal matters.[3]

Three members of the Florida Committee, however, filed a minority opinion on the issue whether judges may add lawyers who appear before them as their friends, arguing that the term "friend" on an internet social networking site does not mean a friend in the traditional sense and that even a traditional friendship without more is permissible. The minority contended:

> The logical extension of the majority's opinion is that judges cannot be friends with any lawyer who appears before the judge since there is no discernable difference between a judge's friendship with an attorney on a social networking site and a judge having lunch with an attorney, playing tennis with an attorney, or engaging in a myriad of other activities with attorneys who appear before the judge. . . . The exclusivity and selectivity by the judge in choosing to spend time and enjoyment with some attor-

1. *Florida Advisory Opinion 2009-20* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html). Contrary to many reports, the opinion was not issued by the Florida Supreme Court, but the committee created by that court to regularly respond to requests for ethical advice from judges.

2. *Florida Advisory Opinion 2010-6* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html).

3. *See also Florida Advisory Opinion 2010-5* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html) (judicial candidate may add lawyers who may appear before him, if elected, as friends and permit such lawyers to add the candidate as their friend).

neys and not others is far more apparent than "friendship" in the social networking setting of the internet.

Less restrictive opinions

The judicial ethics committees in New York and Kentucky issued less restrictive opinions than the Florida Committee but still emphasized that judges must exercise caution in their use of social networks.[4] Stating "in some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting," the New York Advisory Committee on Judicial Ethics noted that a judge "generally may socialize in person with attorneys who appear in the judge's court," subject to the code, and that there is nothing "per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page."[5]

Acknowledging the many "news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly," the Committee concluded, "the question is not whether a judge can use a social network but, rather, how he/she does so." Moreover, even before the most recent Facebook privacy flap, the Committee warned judges to "stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance."

Similarly, the Ethics Committee of the Kentucky Judiciary advised that a judge may participate in an internet-based social networking site, such as Facebook, Linkedin, Myspace, or Twitter, and be "friends" with persons who appear before the judge in court, such as attorneys, social workers, and law enforcement officials.[6]

> While social networking sites may create a more public means of indicating a connection, the Committee's view is that the designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend." The Committee conceives such terms as "friend," "fan," and "follower" to be terms of art used by the site, not the ordinary sense of those words.

The Committee acknowledged that it had "struggled with this issue, and whether the answer should be a 'Qualified Yes' or 'Qualified No,'" noting that several judges around the state who had joined internet-based social networks later limited or ended their participation. The Committee concluded that judges should be "**extremely cautious** that such participation does not otherwise result in violations of the Code of Judicial Conduct."

Both the Kentucky and New York committees emphasized that a judge must consider whether any online connections, alone or in combination with other facts, rise to the level of a close social relationship requiring disclosure and/or recusal. The New York Committee noted that "the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond." Both committees also warned judges to be careful not to respond to inquiries from users who want the judge to discuss their cases, comment on pending cases or controversial issues, or provide legal advice.

In addition, noting a news article reporting a judge's statement that he uses "'sites to keep track of adjudicated offenders under his jurisdiction,'" the Kentucky Committee reminded judges that they may not independently investigate facts. Further, the Kentucky Committee advised that it would be inappropriate for judges to post pictures and commentary that may be of "questionable taste" even if that conduct would be acceptable for the general public.

The advisory committees' misgivings are well-placed. Although social networks are a relatively new phenomenon, some judges have already begun to display a lack of judgment usually associated with teenagers. A judge was sanctioned by the North Carolina Judicial Standards Commission for ex parte communications on Facebook with counsel in a child custody and child support hearing being tried before him.[7]

The Florida Judicial Qualifications Commission recently filed charges against a judge alleging, in addition to much other misconduct, that he viewed Facebook on the bench during court proceedings.[8] Newspapers have reported that a Georgia judge resigned after the Commission on Judicial Qualifications began investigating his communications on Facebook with a woman who had a case pending before him. Other reports from New York assert that a judge was transferred by the administrative office of the courts at least in part because he used his Facebook account to provide details of his location and schedule, up-dated his status while on the bench, posted a photograph of his crowded courtroom to his account, and invited several lawyers to be his friends on Facebook. With friends like that, the judiciary needs to be more careful.

Editor's Note: Follow the American Judicature Society on Twitter @ #ajs_org and become a fan on Facebook.

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4. *See also South Carolina Advisory Opinion 17-2009* (www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009) (judge may be a member of Facebook and be friends with law enforcement officers and employees as long as they do not discuss anything related to the judge's position).

5. *New York Advisory Opinion 08-176* (www.nycourts.gov/ip/judicialethics/opinions/08-176.htm).

6. *Kentucky Advisory Opinion JE-119* (2010) (courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf).

7. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp).

8. www.floridasupremecourt.org/pub_info/summaries/briefs/10/10-348/Filed_05-13-2010_JQC_Order.pdf.